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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

In the Matter of Implementation of Secton 26 of the Cable Television Consumer Protection and Competition Act of 1992 Inquiry into Sports Programming Migration	)	PP Docket No. 93-21

FURTHER NOTICE OF INQUIRY REPLY COMMENTS BY THE ASSOCIAITON OF INDEPENDENT TELEVISION STATIONS, INC.

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April 26, 1994

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Executive Summary

INTV believes the FCC should revise the findings of its Interim Report. Sports migration is continuing at the local market level. This is especially true with respect to local over-the-air college football broadcasts and local coverage of Major League Baseball games.

The decline in over-the-air college football games is staggering. A study of nine television markets demonstrates that there is a direct statistical correlation between the increase in college football games on cable channels and a decline in over-the-air broadcasts. This decline is due to the preclusive time period exclusivity arrangements entered into between the college football conferences, ABC, ESPN and regional cable sports channels.

Preclusive exclusivity contracts cannot be justified under basic competition principles. Restrictions in the supply of college football games are contrary to any notion of the public interest. Parties to these contracts have failed to justify these arrangements on public interest grounds.

Local television stations are being squeezed out of the market for local baseball rights. ESPN's preclusive contract with Major League Baseball artificially limits the supply of games on Wednesday and Sunday nights. Major League Baseball's contract with the broadcast networks further restricts the ability of a local station to broadcast games in prime time.

At the same time, local television stations are being outbid by cable sports channels for the rights to local games. While Major League Baseball asserts that other factors may lead to the decline in local games, it fails to recognize that games appearing on cable sports channels are the key reason why games are leaving broadcast television in numerous markets.

The Commission should report to Congress that sports siphoning is a major concern. The FCC should commence a Notice of Proposed Rulemaking on this subject. The Commission should propose rules that prohibit preclusive time period exclusivity contracts. Also, the FCC should propose new anti-siphoning rules which would prevent further declines in off-air telecasts.

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In its Further Notice the Commission stated that its analysis of the sports migration issue should "draw upon competition principles." While the Commission's analysis of sports migration, and in particular its analysis of preclusive contracts, will necessarily involve issues regarding competition, INTV believes that the analysis must consider fundamental communications law and public interest principles as well.

In other words, it is not necessary for the FCC to find specific antitrust violations in order to enact pro-competitive rules. The Commission's obligations under the Communications Act are much broader. The Supreme Court sustained the FCC's original "chain broadcasting rules" on precisely this ground. There the court noted with approval the Commission's analysis of its obligations under the Communications Act:

> The prohibitions of the Sherman Act apply to broadcasting. This Commission, although not charged with the duty of enforcing that law, should administer its regulatory powers with respect to broadcasting in the light of the purposes which the Sherman Act was designed to achieve...While many of the network practices raise serious questions under the antitrust laws, our jurisdiction does not depend on a showing that they do in fact constitute a violation of the antitrust laws. It is not our function to apply the antitrust laws as such. It is our duty, however, to refuse licenses or renewals to any person who engages or proposes to engage in practices which will prevent either himself or other licensees or both from making the fullest use of radio facilities. This is a standard of public interest, convenience and necessity which we must apply to all

> applications for licenses and renewals...We do not predicate our jurisdiction to issue the regulations on the ground that the network practices violate the antitrust laws. We are issuing these regulations because we have found that the network practices prevent the maximum utilization of radio facilities in the public interest.[1]

In fact, the FCC has regularly adopted rules governing contractual relations between stations and program suppliers, even though there were no specific antitrust violations. For example, 47 C.F.R. Section 73.658 gives local affiliates the right to reject specific programs and establishes geographic limits on program exclusivity.

While INTV is willing to discuss sports siphoning in the context of competition principles, we do not believe the Commission must find a specific antitrust violation in order to enact rules that foster diversity and competition.

An overall analysis of the public interest should take into account several factors beyond market efficiencies.[2] A fundamental tenant of the communications policy is to facilitate program choices that are available to the American public. This is sound policy. It is not denied that almost every professional

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[1] National Broadcasting Co., Inc. v. United States, 319 U.S. 190, 223-224.

[2] INTV provided a full discussion of the societal considerations in earlier comments. See INTV Comments in PP Docket No.93-21, March 29, 1993 at 2-5; INTV Reply Comments in PP Docket No. 93-21, April 12, 1993 at 7.

sports team and college in the United States receives some form of public assistance.[3] Educational institutions are generally immune from local property taxes and receive millions of dollars in federal and state aid. Having supported these institutions, the American public should not be denied the ability to receive local games on free, over-the-air television.

Also, "time period" preclusive contracts are commonly employed by cable sports channels. It is one thing for a cable channel to obtain the rights to a specific game. In this situation, approximately 40 percent of the American public will not have access to that game. However, when a cable channel invokes time period exclusivity, games which are not even going to be cablecast, cannot be seen on local television stations. Such arrangements are simply inconsistent with any notion of the public interest.

I. COLLEGE FOOTBALL

A. Current Time Period Exclusivity Contracts are Inconsistent with Basic Competition Principles.

In our Further Comments we outlined the principal reasons as to why ABC and ESPN's contracts were inconsistent with basic

[3]The tax breaks and give-aways to lure professional sports franchises to cities are legendary. See USA Today, September 17,1993 at 7C. Closer to home, Jack Kent Cooke will be enjoying his new skyboxes at considerable expense to Maryland taxpayers. See Washington Post, April 21, 1994 at B1.

competition theory.[4] Nevertheless, ABC argues that its contracts are consistent with competition law principles.[5] ESPN, which is owned by ABC, and others also rely on this analysis.[6]

1. <u>Market Power and Product Definition</u>

ABC claims that regardless of the restrictions involved, time period exclusivity contracts are not inconsistent with competition theory because neither ABC nor the college conferences have "market power." ABC argues that it is not in a position to control "down stream" advertising prices and observes that it is the college conferences who have market power with respect to "up stream" sports rights.[7]

There is no doubt that ABC and ESPN, which have contracts with just about every major college conference in the country do exercise market power. Nevertheless, specific proof of market

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[4]It is important to recognize the preclusive contracts are not confined to ABC and ESPN. Most local cable sports channels have similar time period exclusivity provisions. <u>See</u> Comments of Affiliated Regional Communications LTD, April 11, 1994 at 14-15. INTV will focus on ABC's Comments because it provides the most extensive argument on the subject.

[5]Comments of Capital Cities/ABC in PP Docket No. 93-21, April 11, 1994 at 8-23; Comments of ESPN in PP docket No. 93-21, April 11, 1994 at 7.

[6]INTV continues to believe that ABC and ESPN's contracts, and similar contracts executed by regional cable sports channels should be considered a per se antitrust violation. Nevertheless, to the extent the Commission has employed a rule of reason analysis, INTV will address the issue at this level.

[7]Capital cities/ABC Comments at 17-20.

power is not required in the instant case. While parties alleging an antitrust violation generally must demonstrate that a defendant has market power, such proof does not appear to be necessary in situations were proof of actual detrimental effects on output obviate the necessity of market power analysis.

> [S]ince the purpose of the inquiry into market definition and market power is to determine whether an arrangement has the potential for genuine adverse effects on competition, proof of actual detrimental effects, <u>such as reduction of output</u>, can obviate the need for an inquiry into market power, which is but a surrogate for detrimental effects.[8]

As applied to sports rights, the <u>NCAA</u> case held that the plaintiffs did not have to demonstrate market power in the viewership market, stating:

> As a matter of law, the absence of proof of market power does not justify a naked restriction on price or output... this naked restraint on price and output requires some competitive justification even in the absence of detailed market analysis.[9]

More recently, the Seventh Circuit provided further clarification of the <u>NCAA</u> case.

> [W]e understand it as holding that any agreement to reduce output measured by the number of televised games requires some justification -- some explanation connecting the practice to consumers' benefits -- before the court attempts an analysis of market power. Unless there are sound justifications, the court condemns the

[8] <u>See</u> <u>FTC v. Indiana Federation of Dentists</u>, 476 U.S. 447, 460 -461 (1986).

[9] <u>National Collegiate Athletic Ass'n v. Board of Regents of the University of Oklahoma</u>, 468 U.S. 85, 109-110 (1984).

> practice without ado, using the "quick look" version of the Rule of Reason....[10]

As INTV documented in its latest comments, the preclusive contracts have limited the output of televised college football games on over-the-air television. This has occurred at the network and, more importantly, at the local level. In addition, the statistical analysis provided below conclusively demonstrates that there has been a significant decline in local over-the-air coverage of college games. We have proved the limits on output. The burden therefore shifts to those entities entering into such contracts to justify limits on output.

Nevertheless, before analyzing the specific justifications, we must respond to ABC's arguments concerning the relevant product market. ABC attempts to define the market broadly, encompassing all sports and entertainment programming. It also attempts to argue that the market is national.

ABC's position conflicts with most courts that have addressed the issue. In the NCAA case, the relevant product market was based on games shown. When INTV filed suit against the CFA in 1986, the CFA admitted that the relevant product market is the

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[10] Chicago Professional Sports Limited Partnership v. NBA, 961 F. 2d, 667, 674 (7th Cir. 1992).

telecast rights to intercollegiate football games.[11] The Ninth Circuit certainly considered the product market to be the broadcasts of intercollegiate football games.[12] Finally, in a related case, the Seventh Circuit expressly rejected the NBA's attempt to define the market in terms of overall entertainment programming and confined its competitive analysis to televised NBA basketball games.[13]

Accordingly, ABC's attempt to expand the product market beyond televised college football games has very little support. Moreover, expanding the market to cover all forms of entertainment programming is flatly inconsistent with the Cable Act's instruction that the Commission examine these contracts as they relate to college football. The Commission is obligated to examine the issue on a sport by sport basis. In effect, Congress has defined the product market in terms of games available on free, over-the-air television. The ability of viewers to access other programs is irrelevant.

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[11] Association of Independent Television Stations, Inc. v. College Football Association, 637 F. Supp. 1289, 1300 n. 10 (W.D. Okl. 1986)

In this case a question arose whether the fledgling USFL, which intended to broadcast games on Saturday, should be included as part of the product market. Id. at 1300-1301. Of course this is no longer an issue today.

[12] Regents of the University of California v. American Broadcasting Companies, Inc., 747 F.2d 511 (9th Cir. 1984)

[13] Chicago Professional Sports Limited partnership v. NBA, 961 F.2d at 674.

2. Output Restrictions Cannot Be Justified On Pro-competitive Grounds

In its recent comments, ABC offers several "efficiency" justifications for the output restrictions contained in its contracts with the CFA, PAC-10 and Big-10 conferences. The "efficiencies" contained in ABC's most recent comments are, at bottom, the same as those articulated by ABC earlier in this proceeding. The Ninth Circuit found similar arguments unpersuasive.[14] Moreover, the Federal Trade Commission's Bureau of Competition rejected this analysis when it decided to bring an action against ABC and the CFA before the Federal Trade Commission. To the extent the latest round of comments further explain ABC's position, we will address these issues below.

Generally, ABC argues that its contracts with the CFA, Big-10 and PAC-10 promotes economic efficiencies by increasing the size of ABC's viewing audience, thereby enhancing the value of ABC's telecasts. However, ABC never quantifies these purported efficiencies. Moreover, it fails to specifically relate these efficiencies to the offending provisions in the contracts, namely: 1) the time period exclusivity provisions and 2) the provisions which give ABC and ESPN the ability to select games with little advanced notice.

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[14] Regents of the University of California v. American Broadcasting Companies, 747 F. 2d at 511.

In other words, how much would the value of the conference contracts decline, if ABC or ESPN were prohibited from including such provisions in their contracts? Would advertisers be unable to find other programs with similar "efficiencies."[15] To the extent INTV has documented a restriction in output in recent years, the burden should be shifted to ABC and ESPN to provide some quantification of the efficiencies gained from such preclusive conditions.

3. Time Period Exclusivity

Both ABC and ESPN contend that their contracts, under certain conditions, will permit local television stations to contract directly with local teams to broadcast live college football games. However, as INTV has demonstrated empirically throughout this proceeding, these conditions effectively preclude live coverage.

First, ABC, ESPN and the regional cable sports channels have all filed separately in this proceeding. Thus, each party is free to state that its contract, in and of itself, does not completely restrict local broadcasts on Saturday afternoons. For example, ABC observes that it has the 3 1/2-hour, 3:30 - 7:00 PM window on

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[15]This is an intriguing question. ABC apparently believes that advertisers looking to find audiences that fit the profile of the college football audience have a variety of programming options on which to advertise. If this is true, then from an advertising perspective why are preclusive contracts such as ABC's and ESPN's arrangements necessary?

Saturdays under the CFA contract. Local stations are permitted to televise live college football at any other time, subject to the overlap prohibitions. (No game can start after 12:10 local time or 12:40 for SEC Schools.) However, this fails to observe that ESPN/Prime Ticket has its own exclusive window with the CFA, generally the evening window which also prevents stations from contracting with local schools. This does not even consider the remaining contracts with regional sports networks, which have acquired rights to various conferences that make up the CFA and have similar exclusive windows. These exclusive window contracts work in tandem. When one window opens, it is closed by other agreements.

Second, the problem is compounded if a team is playing a school in another time zone. Since the local game starting time determines the exclusivity window, ABC and ESPN have in effect, rolling exclusive windows. Remember, the CFA has member schools throughout most time zones, the PAC-10 is obviously on pacific time and the Big-10 are, for the most part central time zones. The Big-8 include central and mountain time zones.

Third, all the major players have separate contracts with several conferences. Accordingly, a window that may be open in the CFA becomes non-existent because of the PAC-10, Big-10 or Big-8 contracts. For example, ABC observes that under its CFA agreement, local stations may broadcast games if they start before 12:10 PM local time. (12:40 PM for SEC schools.) It goes on to illustrate the situation where a local station could broadcast a live game which is being played in Los Angeles at 12:00 pacific time. According to ABC, an east coast station could broadcast the game live, which would mean a 3:00 telecast on the east coast. Of course if you are playing in Los Angeles, your east coast team is probably playing a PAC-10 school. ABC has an exclusive window for PAC-10 and Big-10 games which could include the early 12:30 pacific time (3:30 eastern time) window. Accordingly, while there may be an open window under the CFA agreement, the window could be closed by the PAC-10 contract.

Fourth, the above situation does not even consider the exclusive windows resulting from the ESPN's contract with the CFA and the ESPN/Prime Ticket contract with the PAC-10 and Big-10. Also, ESPN has the early Saturday window with the Big-8. On this point ESPN notes that under its agreements, local games may be broadcast:

> ...subject only to exclusivity provisions as to particular time periods and our CFA deal even permits schools to televise locally games not selected by ESPN during ESPN's telecast window.[16]

According to this language, there appear to be no home market exemptions with respect to ESPN's contract with the Big-10 and the

[16] ESPN Comments in PP Docket No. 93-21, April 11, 1994 at 5.

ESPN/Prime Ticket contract with the PAC-10. The home market exemption appears to apply only to the CFA agreement.

Finally, regional sports channels have executed similar time period exclusivity contracts with other conferences such as the Western Athletic Conference and the Big West. Thus, interconference games become even more difficult because the "cross over" rules.

The situation is perhaps best summed up by the PAC-10's comments which noted observed the difficulty of local stations to broadcast live games:

> Our individual Conference members themselves all have contracts with local television stations or cable companies for their home games. The individual institutions negotiate these agreements themselves and are free to do so, <u>although provisions of such agreements must not conflict with the Pacific-10 agreements with ABC or Prime Ticket Network</u>. I believe that the great majority of the telecasts or cablecasts under these agreements are on a delayed basis, that is to say the telecast or cablecasts occur subsequent to the conclusion of the games.[17]

In justifying time period exclusivity, ABC states that the provisions are necessary to insure that the audience will not be diluted by simultaneous telecasts, thereby increasing its audience size and the value of these telecasts. It goes on to note that

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[17]Response of Thomas C. Hansen to Further Notice of Inquiry in PP docket No. 93-21, April 11, 1994 at 2.

exclusive windows are important to avoid "free riding" by local stations that may want to broadcast local games.

INTV is puzzled by this contradictory analysis. On the one hand, they note that the preclusive effects of the contracts are necessary in order to create efficiencies to enhance the value of the network telecasts. In other words, the purported justification depends on the exclusivity provisions effectively blocking competing telecasts. At the same, however, ABC argues that there are exceptions that permit local live competing telecasts. ABC and ESPN cannot have it both ways. INTV believes that the exclusivity provisions are quite effective at eliminating competing local broadcasts and that the justifications offered do not justify such restrictions on output.

ABC alludes to the fact that time period exclusivity provisions are necessary to prevent "free riders." ABC does not explain how local stations, broadcasting games that will not otherwise be broadcast by ABC, are getting a "free ride." Similar "free riding" arguments were presented and rejected by the Seventh Circuit.[18] First, throughout its comments ABC emphasizes the need to promote the competition that will occur when two specific teams meet. (This is the primary justification for the short notice provisions.) It is the competition between two teams that is the

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[18] Chicago Professional Sports Limited Partnership v. NBA, 961 F.2d at 675.

focus of ABC's promotional efforts. A local station broadcasting a college football game that ABC, ESPN and others are not telecasting in no way constitutes a "free ride" on these promotional efforts. The teams, hence the competitive relationships are different. Moreover, ABC, ESPN and other regional cable channels are focusing on regional and even national telecasts. A local station attempting to broadcast a local college game does not undermine these national or regional efforts. Finally, a local station providing coverage of a local college team pays full value for the right to broadcast a specific game. The station spends its own money to promote and make that particular game attractive to its audience. The concept of "free riding" is simply inapplicable to this situation.

4. Time Block Exclusivity Bears No Relation To Traditional Exclusivity Contracts

ABC is correct that exclusivity arrangements are common in the broadcast and cable industries. A television station generally contracts for the exclusive right to broadcast a program in its respective market. For example, a local Independent television station in Washington may contract for the exclusive rights to show "Star Trek: The Next Generation." No other station in Washington, may broadcast this show during the duration of the contract. However, this type of exclusivity is dramatically different than the preclusive time period exclusivity blocks that appear in ABC, ESPN and other cable sports channels contracts.

When a television station or cable network contracts for a movie or program series, the station generally broadcasts the program. There is no restriction of output and the program can be seen throughout the market. In fact, most entertainment programs are broadcast several times during the life of the contract. As we noted previously, the time period exclusivity provisions are analogous to a station contracting for a science fiction program, like "Star Trek," then preventing any other station from broadcasting any science fiction programs during a specific time period.[19]

ABC's attempt to analogize these contracts to the FCC's syndicated exclusivity rules is misplaced. With syndex, the issue is the ability of a local station to prevent a cable operator from

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[19]Accordingly, ABC's reliance on Ralph C. Wilson Industries v. Chronicle Broadcasting Co., 794 F. 2d 1359 (9th Cir 1986) is misplaced. That case involved the situation where a station in San Jose challenged the geographic scope of the exclusivity contracts executed by San Francisco stations. The court rejected the claim because of overlapping signals making San Francisco and San Jose part of the same market. Id. at 1364. Accordingly, the citizens of San Jose were not denied access to programs because they could see them on the San Francisco stations.

Similarly, Woodbury Daily Time Co. v. Los Angeles Times, 616 F. Supp 502 (D.C. N.J. 1985) is not on point. In this case a small suburban newspaper was prevented from contracting with a news service because of the service's exclusive contract with a larger metropolitan paper. The court rejected the antitrust claim because the circulation area of the metropolitan paper included the suburban paper's area. While the court noted that the larger newspaper may not print all of the service's stories, it found that because the two papers catered to the same population, both papers would probably print the same stories provided by the news service. Thus there was a substantial possibility of duplicating stories. This is not the situation confronting the FCC in the instant case.

importing the identical programming into the local market. INTV is not arguing that a local station should be able to duplicate ABC's or ESPN's game. If ABC is broadcasting the USC v. UCLA game, then a local station could not secure the rights to duplicate this broadcast. Our complaint is that the time period exclusivity prevents live local coverage of games that are not going to be broadcast or cablecast. Unlike syndicated exclusivity, the issue is not the duplication of programming, it is the warehousing of games that are not going to be telecasted.

Also, the underlying purpose of syndex was to promote local over-the-air television. The policy concern was that under the compulsory license, a cable operator could import duplicate programming which in turn undermined the local station's exclusivity rights. In the instant case, the time period exclusivity contracts, especially as they apply to cable networks, are undermining local over-the-air television. To this extent, the policy considerations that underpin the syndex rules argue for elimination of contractual provisions that serve to limit programming on local over-the-air television stations.

5. Game Selection on Short Notice

ABC argues that the exclusivity provisions are necessary to create a season-long package with widespread interest that will attract the largest audience. To this end, it must retain the option to select the best games as the season progresses.

ESPN notes that it generally selects games on no less than 12 and some time fewer than six days notice.[20] ABC's contract contains similar game selection provisions.

The potential anticompetitive consequences of these provisions should not be underestimated. The short notice provisions make it impossible for a local station to contract with a local school for the broadcast of games. Local schools are reluctant to contract because they are not sure whether the school will be televised under its conference agreements with ABC or ESPN. Second, it is next to impossible for a stations to make production arrangements and promote a game with only a week's notice. Finally, and perhaps most importantly, game selection will affect the time period exclusive window. As ABC notes, the windows are triggered by the local starting time of the game. As a result the exclusivity windows, and the overlap time periods which are similarly protected can change depending on which game is selected. For example, ABC observes in its comments that, with respect to its PAC-10 contract, it could select either a game starting at 12:30 PM pacific time or a game beginning at 3:30 pacific time.

The short notice provisions cannot be justified in order to provide a competitive product. ESPN stated that its "special" prime time CFA Thursday night telecasts are selected at least seven

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[20]ESPN Comments at 6.

months in advance.[21] ARC notes that under its new contract with the Big-8 Conference, it will be permitted to submit a list of ten games to the conference each year, from which it will be assured of one game not subject to preemption by ABC.[22] Finally, the PAC-10 observed that ABC provides a preliminary schedule of its games by March 15 and definite selections for the September games by May 1. In fact one-third to forty percent of the games televised are selected by May 1.[23]

If short term notice was essential, how can ESPN make its game selection for its Thursday night telecasts seven months in advance. Presumably, ESPN faces the same considerations in scheduling these telecasts as it does in scheduling Saturday afternoon games. The same holds true for ABC which makes a significant amount of its selections by May 1.

There can be no doubt that the short notice game selection provisions are not necessary to create an attractive and competitive network contract. The short term notice provisions which apply to Saturday games do nothing more than prevent local stations from contracting with local schools.

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[21]ESPN Comments at 5.

[22]Further Comments of Affiliated Regional Communications, Ltd in PP docket No. 93-21, April 11, 1994 at 14.

[23]PAC-10 Comments at 3.

6. Policy Considerations

ABC summarizes its policy arguments with several observations. First, it notes that ABC's contracts permit local stations to televise games -- albeit at times when ABC games are not televised -- so it is likely that there would be such local telecasts if the schools and stations desired them.[24]

INTV believes it has provided more than adequate evidence that local stations do, in fact, want to provide live local coverage of college games. Local stations such as KMPH-Fresno, KCPQ in Seattle, KMSB in Tucson and KUTP in Phoenix continue to try to broadcast live local games but are unable to do so because of the preclusive contracts.[25] Data presented below demonstrate a major constriction in output. Moreover, even if there are open windows with respect to ABC's CFA contract, these windows are closed to local stations due to additional contracts with ESPN and regional sports channels.

ABC also asserts that even if its contracts, as a practical matter, prevent the broadcast of some games, this would not present a problem under competition law principles.[26] As noted above,

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[24]Capital Cities/ABC Comments at 21.

[25]See INTV Comments, March 29, 1993 at 10-17.

[26]ABC's analogy to an appliance store does not apply. (The days when television was considered to be nothing more than a toaster with pictures appear to be over.) See Capital Cities/ABC Comments at 24. In the competitive retail marketplace, exclusive distribution arrangements may promote competition. In these

restrictions on output are inconsistent with basic competition principles. Indeed, even if the restrictions prevented only a handful of games from being broadcast by local stations, that is enough to run afoul of competition principles. In the context of the NBA's restriction on games which could be sold to superstations, the Seventh Circuit observed:

> That the NBA's cutback is only five games per year is irrelevant; long ago the Court rejected the invitation to inquire into the "reasonableness" of price output decisions. (citations omitted) Competition in markets, not judges sets price and output. A court applying the Rule of Reason asks whether a practice produces net benefits for consumers; it is no answer to say that a loss is "reasonably small."[27]

On balance ABC's justifications for preclusive contracts fail. As we will demonstrate below, the restrictions do not increase output, they restrict it.

Finally, ABC's position appears to be contradictory. On the one hand, it argues that stations probably do not want to broadcast college football games, claiming that stations desiring football would bid the rights away from ABC.[28] At the same time, however, ABC believes preclusive contracts are necessary to prevent local

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situations a consumer can go to another store to get the desired name brand appliance. Preclusive contracts prevent competing goods, *i.e.* games not otherwise covered, from ever being brought to the marketplace. The games remain in the warehouse.

[27] Chicago Professional Sports Limited partnership v. NBA, 961 F.2d at 674.

[28] Capital Cities/ABC Comments at 23.

stations from broadcasting competing telecasts. If ABC, ESPN and other truly believed that stations don't want these games, why do they need preclusive restrictions in their contracts? Presumably the restrictions could be eliminated and local stations would not broadcast competing games.

The reality is that ABC believes that local stations would begin to broadcast competing games that are not otherwise going to be broadcast. Prior to 1986, the college football marketplace included an increasing number of non-network local games. Accordingly, in order to secure its own private interest, ABC, ESPN and cable sports channels found it necessary to restrict competition from local stations. The effects of this strategy are documented below.

B. Preclusive Contracts Between College Conferences, ABC, ESPN and Cable Sports Channels Have Restricted Output and Forced College Football Off Free Television.

The Commission has requested additional information regarding trends in the number of games appearing on cable and local television stations. In our initial comments, we provided descriptive data detailing the overall decline in games in the San Francisco, Tucson and Minneapolis markets from 1984 to 1992.

1. **Descriptive Data Confirm That Live College Football Games Are Migrating Away From Local Over-The-Air Television Stations.**

To further supplement the data, Pappas Telecasting Companies conducted an in-depth examination of college football games from 1984 through 1993. Data were drawn from the Saturday sports listings from major newspapers in the following television markets: 1) Cedar Rapids-Waterloo-Dubuque; 2) Chicago; 3) Detroit; 4) Eugene, OR; 5) Columbus, OH, 6) Harrisburg-York-Lancaster, 7) Lansing MI; 8) San Francisco-Oakland-San Jose, and 9) Los Angeles. The trends in football coverage for each market and a summary of trends in all markets can be found in the Appendix Volume at Tab B.

The results of the analysis support our earlier conclusion that live over-the-air coverage of college football has declined significantly. More importantly, there has been a significant decline in local, non-network college games covered by local television stations.

As Table 1 indicates, the number of games appearing on over-the-air broadcasting increased steadily from 1984 (408) to 1986 (506). This hold true for games appearing on the broadcast networks, and non-network (local) games. It is interesting to note that during this time period the number of games appearing on cable networks, both national, regional and local, actually declined slightly from 433 games in 1984 to 428 in 1986.